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Defendant.

CASE NO.
MS-1-00-017

Commonwealth of Kentucky

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<p>1 APPEARANCES:</p> <p>2 On behalf of the plaintiff:</p> <p>3 Richard S. Ketcham, Esq.</p> <p>4 of</p> <p>5 Ketcham & Ketcham</p> <p>6 755 South High Street</p> <p>7 Columbus, Ohio 43215</p> <p>8 and</p> <p>9 David J. Graeff, Esq.</p> <p>10 P.O. Box 1948</p> <p>11 Westerville, Ohio 43086</p> <p>12 On behalf of the defendant:</p> <p>13 Tara L. Berrien, Esq.</p> <p>14 and</p> <p>15 Charles Wille, Esq.</p> <p>16 Capital Crimes SOT</p> <p>17 30 E. Broad Street, 26th Floor</p> <p>18 Columbus, Ohio 43215</p> <p>19 ---</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>1 DALE G. SCHMIDT</p> <p>2 of lawful age, a witness herein, being first duly sworn as</p> <p>3 hereinafter certified, was examined and deposed as follows:</p> <p>4 DIRECT EXAMINATION</p> <p>5 BY MR. KETCHAM:</p> <p>6 Q. My name is Rick Ketcham and this is Dave</p> <p>7 Graeff. We're representing Gerald Clemons on the federal</p> <p>8 habeas corpus. And this is the deposition of Dale Schmidt,</p> <p>9 who was one of Mr. Clemons' trial attorneys. Deposition by</p> <p>10 agreement, correct?</p> <p>11 MS. BERRIEN: That's correct.</p> <p>12 A. That's correct.</p> <p>13 Q. Any other preliminary matters? Mr. Schmidt,</p> <p>14 would you, just for the record, give us your name and your</p> <p>15 office address here?</p> <p>16 A. My name is Dale G. Schmidt, and the office</p> <p>17 number is 904 Highland Towers, 1071 Celestial Street,</p> <p>18 Cincinnati Ohio, 45202.</p> <p>19 Q. And you are engaged in the private practice of</p> <p>20 law?</p> <p>21 A. I am.</p> <p>22 Q. How long have you been?</p> <p>23 A. Since 1965.</p> <p>24 Q. What kind of practice basically do you do?</p>
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<p>1 INDEX</p> <p>2 DALE G. SCHMIDT PAGE</p> <p>3 Direct Examination by Mr. Ketcham 4</p> <p>4 Cross-Examination by Ms. Berrien 24</p> <p>5</p> <p>6 (No exhibits.)</p> <p>7 ---</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>1 A. I do general practice.</p> <p>2 Q. Including criminal defense?</p> <p>3 A. That's correct.</p> <p>4 Q. And you were one of the trial lawyers for</p> <p>5 Gerald Clemons, which was a capital case that was tried in,</p> <p>6 I believe, 1996, correct?</p> <p>7 A. I believe that was 1996. I mean, really, my</p> <p>8 memory doesn't run back too far. I defended him, yes.</p> <p>9 Q. Prior to the Gerald Clemons case have you had</p> <p>10 any other capital trials?</p> <p>11 A. Yes.</p> <p>12 Q. About how many?</p> <p>13 A. I never kept score, but probably at least 30.</p> <p>14 Q. At least 30. Under the new death penalty law</p> <p>15 that was enacted in 1981 or thereabouts?</p> <p>16 A. I'm sorry?</p> <p>17 Q. All under the law as it is presently enacted or</p> <p>18 were there some under the old death penalty law that we had?</p> <p>19 A. I started probably around '60 some odd, you</p> <p>20 know, and I'm not sure when, late '60s or early '70s started</p> <p>21 trying murder cases. And tried them before the '81 law and</p> <p>22 after.</p> <p>23 Q. Who was your co-counsel on the Clemons case?</p> <p>24 A. Mark Krumbein.</p>

2 (Pages 2 to 5)

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1 Q. Do you remember who appointed you to that case?
 2 A. I am not sure but I think it was Judge Nadel,
 3 Judge Norbert Nadel.
 4 Q. He was the trial judge, I believe, wasn't he?
 5 A. That's correct.
 6 Q. At what point did you get appointed to that
 7 case? Was it prior to arraignment or after arraignment?
 8 A. Which arraignment? Municipal court?
 9 Q. Common pleas court is what I'm referring to.
 10 A. Before.
 11 Q. Before that. So maybe you were appointed
 12 shortly after the municipal court arraignment?
 13 A. Certainly, shortly after arrest.
 14 Q. And did you and Mr. Krumbein go down to see
 15 Gerald pretty soon after you became appointed?
 16 A. Yes. I don't know if he went with me the first
 17 time or not but we usually try to make it joint.
 18 Q. Have you tried any other capital cases with
 19 Mark Krumbein?
 20 A. I think so. I am at a loss for memory. I may
 21 have, yes. Yes, I'm sure, I did. I tried -- some guy out
 22 in Harrison. I can't remember his name offhand.
 23 Q. Do you have any idea, under the new law since
 24 1981 law, how many jury trials you have had involving the

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1 death penalty?
 2 A. I don't keep score.
 3 Q. I know Mr. Clemons is currently on death row.
 4 Have you had any other trials that resulted in a verdict of
 5 death?
 6 A. I figured it out, roughly, I think I've tried
 7 about 40 of them. And I think I've got eight on death row.
 8 Two of them don't need to be there. They turned down pleas.
 9 Q. That's common. That happens a lot when they
 10 turn down pleas, it seems. When you and Mr. Krumbein
 11 started representing Gerald did you two -- obviously you had
 12 several meetings, I imagine. Did you sign on a division of
 13 duties as to who was going to be responsible for what?
 14 A. No. We just worked in conjunction and got the
 15 job done. I can't remember what we did in that case, but
 16 normally we just worked together and what had to be done had
 17 to be done.
 18 Q. This case in particular, I believe wasn't
 19 exactly a who-done-it. It was pretty well established
 20 that -- they could establish who was the shooter; is that
 21 correct?
 22 A. Very well. A lot of press.
 23 Q. A lot of press. High publicity case, wasn't
 24 it? What kind of strategy did you and Mr. Krumbein decide

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1 upon that would be the way to defend this case?
 2 A. Well, he was taking Prozac, as I recall. And I
 3 think he had been diagnosed sometime along the line in those
 4 days pre-'81, I guess it was still manic depressive, which
 5 that would be bipolar, and to be politically correct. And
 6 that was about the only thing we could do.
 7 Q. So basically you were looking at state of mind
 8 issues?
 9 A. That's about the only thing we could do.
 10 Q. When did you first become aware of the Prozac
 11 issue with Mr. Clemons?
 12 A. I'm not sure.
 13 Q. Do you remember how you became aware of that?
 14 A. He told me.
 15 Q. In your conversations with him I imagine you
 16 thoroughly explored his background, his medical history,
 17 physical history, military history and all that; is that
 18 right?
 19 A. I did.
 20 Q. At one point in time, I believe you considered
 21 giving a reason of insanity plea, did you not?
 22 A. Yes, but he didn't meet the criteria.
 23 Q. Who did the evaluation for that?
 24 A. I'm really not sure. They all meld together.

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1 I think it was probably the clinic, and maybe Dave
 2 Chiapponne. He's a psychologist.
 3 Q. How about Nancy Schmidt-Goessling?
 4 A. Could have been Nancy, too. They are married
 5 and they work together. It was probably Nancy. It could
 6 have been either one of them. They would do it. And again,
 7 it just runs together in my mind. I don't recall.
 8 Q. You at one point in time, I believe, did
 9 have -- the court clinic did an examination on Mr. Clemons
 10 for mitigation purposes, right?
 11 A. That's correct.
 12 Q. Now, the court clinic, Nancy Schmidt-Goessling
 13 gave her report to the prosecution and to the defense; is
 14 that correct?
 15 A. That's correct.
 16 Q. Did you ever consider asking the judge for an
 17 independent psychological evaluation?
 18 A. I don't remember.
 19 Q. You don't remember?
 20 A. No.
 21 Q. Can you think of any reason why you would not
 22 ask the Court for an independent psychological evaluation
 23 that wouldn't have to be given over to the prosecution
 24 unless you used it?

3 (Pages 6 to 9)

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1 A. I don't remember.
 2 Q. Do you recall in several pretrial hearings with
 3 Judge Nadel discussing the possibility of a Prozac defense?
 4 A. I don't know if we discussed it with the judge
 5 or not.
 6 Q. Well, do you recall the judge asking you if you
 7 wanted to get a -- appoint an expert on Prozac?
 8 A. No, I don't remember that one way or the other.
 9 Q. Do you remember your co-counsel, Mr. Krumbein
 10 talking to the press and indicating in a story that ran on
 11 March 8th of 1996 that you were going to present a Prozac
 12 defense. You were going to consult with various experts?
 13 Do you remember them going to the press and that being in
 14 the paper?
 15 A. No.
 16 Q. When you were preparing this case for trial you
 17 knew Prozac would be an issue, apparently, correct, of some
 18 kind?
 19 A. I assume so. I knew about Prozac.
 20 Q. Did you undertake any investigation to find out
 21 more about Prozac and the effects it has on people?
 22 A. I talked to the people from Lilly, yes.
 23 Q. Lilly is the manufacturer of Prozac, correct?
 24 A. That's correct.

1 Q. Do you remember who you talked to?
 2 A. No.
 3 Q. I know at trial at some point they had a Dr.
 4 Keck, who I believe testified for Lilly in other cases. Did
 5 you talk to him?
 6 A. At one point I did, yes.
 7 Q. At one point, prior to trial?
 8 A. Yes.
 9 Q. Were you aware that they were going to call him
 10 as a witness?
 11 A. Yes.
 12 Q. Did you check out his credentials?
 13 A. Did I check them out?
 14 Q. Right.
 15 A. I don't remember.
 16 Q. Were you aware that he testified for Lilly, for
 17 the manufacturer of Prozac on other occasions?
 18 A. He said so, yes.
 19 Q. When he testified in rebuttal is there any
 20 reason you didn't point that out to the jury that he has
 21 testified for Eli Lilly before, the manufacturer of Prozac?
 22 A. I don't remember.
 23 Q. Do you recall him being very firm in his
 24 opinion that Prozac had no adverse effects on people?

1 A. Yes.
 2 Q. Did you attempt to find an expert on Prozac to
 3 contradict him?
 4 A. I don't think so.
 5 Q. Were you aware of any literature or studies
 6 that indicated Prozac could have an adverse effect and, in
 7 some studies have indicated could induce mania in people
 8 and that type of aggressive reaction? Are you aware of any
 9 studies like that?
 10 A. I have read several.
 11 Q. Is there any reason you didn't cross-examine
 12 Dr. Keck about those studies when he took the witness stand?
 13 A. If I didn't, I didn't. I don't know what the
 14 reason was.
 15 Q. Did you consider a defense of voluntary or
 16 involuntary intoxication induced by Prozac when you were
 17 formulating your strategy for this case?
 18 A. I don't recall. I don't think so.
 19 Q. If in fact, the record reflects that the court
 20 was willing to consider appointing you or paying for an
 21 expert on Prozac, can you think of any reason why you would
 22 not have followed up on that?
 23 A. No.
 24 Q. I believe in the opening statement you did

1 mention that Gerald was on Prozac, did you not? And at
 2 least use it in part as your defense?
 3 A. I'm sure. If it's in there it's in there.
 4 Q. Do you recall, besides Nancy Schmidt-Goessling,
 5 if you ever made a request for an independent psychological
 6 evaluation for mitigation?
 7 A. I'm sorry?
 8 Q. Do you recall if you made, when it came to
 9 mitigation, if you made a request for an independent
 10 psychological evaluation not done by the court clinic?
 11 A. I don't remember. I don't think I did.
 12 Q. Okay. You're aware, I assume, that the court
 13 gave an independent evaluation, that that would be done on
 14 behalf of your client, not on behalf of the court, rather
 15 than what the court clinic had mentioned; is that right?
 16 A. Yes.
 17 Q. You did use Dr. Day, who I believe was a
 18 treating doctor for Gerald Clemons; is that correct?
 19 A. I don't remember the name, quite frankly.
 20 Q. You used his treating doctor, I believe; do you
 21 recall that?
 22 A. I'm sure. I talked to everybody I could find.
 23 Q. And he was a medical doctor?
 24 A. Yes.

4 (Pages 10 to 13)

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1 Q. Did you attempt to get a psychiatrist or a
2 psychologist to testify as to the effects of Prozac?
3 A. I couldn't find anybody, if I recall, or I
4 would have called them.
5 Q. Prior to trial in one of the motions hearings
6 you had several motion hearings and one was a motion to
7 suppress evidence and statements that Mr. Clemons made,
8 correct?
9 A. That's correct.
10 Q. I believe it was agreed between the prosecutor
11 and you and the court that the statements to the Evendale
12 police would be suppressed?
13 A. Absolutely.
14 Q. Because they advised him of his rights and he
15 invoked his Miranda rights?
16 A. I remember that specifically because it's a
17 lesson in how not to take a statement for the police. And
18 it was a classic example of -- excuse me. I do remember
19 because they sent me a copy of the tape and I sat down and
20 watched it and it was a classic. He kept asking for a
21 lawyer and they kept playing with the phone book. This I
22 have a visual of because it is a classic example. That
23 statement could never get in. And he kept asking for a
24 lawyer and they kept playing around with the phone and

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1 testimony and go over the story with him?
2 A. I'm sure we did. I have always done that. I
3 don't let a client get on the stand without -- and one of us
4 was probably playing prosecutor when we went through the pre
5 -- trying to rattle him and see what we could do. I never
6 put a client on the stand unless I cross-examine him at the
7 same time.
8 Q. In the transcript you objected when the
9 prosecution used a suppressed statement to impeach him. And
10 you seem surprised that the court allowed him to use that.
11 Did you prepare Gerald for dealing with being questioned
12 about his statement to the police?
13 A. I'm sure I did.
14 Q. You were aware that even though it was
15 suppressed were you aware he could use it in impeachment?
16 A. Yes.
17 Q. In preparing Gerald to testify, did you advise
18 him if he testified that the statement he made with the
19 police could be used against him even though it was
20 suppressed?
21 A. I don't recall if I did or not.
22 Q. At trial and at mitigation Mr. Clemons was
23 fairly calm throughout, wasn't he? His attitude, I mean,
24 wasn't overly excited and aggressive?

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1 everything. They kept talking to him. And I think the
2 prosecutor, when they saw it, it was just not admissible.
3 Q. So it was press prior to trial?
4 A. Yes.
5 Q. When you got into your case and you put Gerald
6 Clemons on the stand, when was the decision made to put him
7 on?
8 A. When or why?
9 Q. Well, both.
10 A. I don't know when. It was just -- had nothing
11 else. I think he wanted to get on the stand, if I am not
12 mistaken, and tell his story. I'm not sure if I --
13 sometimes these things sort of go together and -- all these
14 murder cases. And I'm not sure if he wanted to or we just
15 didn't have any other choice but to put him on.
16 Q. So was this a decision you made before you even
17 started trial, do you know, or something you made during the
18 course of the trial?
19 A. Oh, it wouldn't have been before trial. It
20 would have been on development of -- I mean, that decision's
21 made after many things are done. You can never decide when
22 to put your client on the stand or not until -- in fact, it
23 may be an eleventh-hour decision. You never know.
24 Q. Did you sit down and prep him with his

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1 A. No. If I recall he was pretty docile.
2 Q. Pretty docile. He was on medication, in fact,
3 during the trial, wasn't he?
4 A. I have no idea.
5 Q. Do you recall you and Mr. Krumbein telling the
6 jury that he was on a Prozac-like drug during trial?
7 A. If it's in the record it's in the record.
8 Q. Okay. Do you recall checking with the jail to
9 see what kind of drug he was on, or did you?
10 A. I don't recall.
11 Q. Would it have been important to you, do you
12 think, if he had been on a drug that -- let me back up.
13 Part of your Prozac defense, I assume, was to indicate that
14 Prozac was in some way partially responsible for his
15 behavior on the day of the murders; is that correct?
16 A. We were trying to create that illusion if we
17 could.
18 Q. So if he was on the same medication, that is
19 Prozac, during trial, and is very calm throughout, wouldn't
20 that kind of be counter-productive to your illusion you were
21 trying to create about Prozac-induced mania?
22 A. I have no idea.
23 Q. Do you think it would have been important to
24 you if you had known that he was on a totally different drug

5 (Pages 14 to 17)

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1 during trial that actually has a calming effect on people
 2 and it's not anything like Prozac, would that have been
 3 important to you?
 4 **A. I don't recall what he was on. I have no**
 5 **independent recollection.**
 6 Q. You also had Jim Crates, mitigation specialist,
 7 to assist you in preparing mitigation, did you not?
 8 **A. I did.**
 9 Q. When you approached the mitigation phase of the
 10 trial did you have a theory of mitigation, you and Mr.
 11 Krumbein?
 12 **A. I'm sure we did.**
 13 Q. Do you remember what it was?
 14 **A. I am not exactly sure. I think it was showing**
 15 **that here was a guy that just blew his stack and, you know,**
 16 **that type of thing.**
 17 Q. From your many meetings with him you pretty
 18 much knew his whole history, didn't you?
 19 **A. Yeah.**
 20 Q. Including his military history?
 21 **A. Oh, yeah.**
 22 Q. You're aware that was in Korea under a fairly
 23 high security clearance?
 24 **A. Yes. That's what he told me.**

1 Q. He was honorably discharged?
 2 **A. Yes. Was down in Florida, worked in Florida,**
 3 **Jacksonville area. I do remember that.**
 4 Q. Was there some reason that was not brought out
 5 in the mitigation phase?
 6 **A. Not that I know of.**
 7 Q. Nothing bad in the records. Speaking of
 8 records, I understand that at the time this mitigation
 9 hearing took place, did he have his military records?
 10 **A. He had to get those from St. Louis. I'm not**
 11 **sure. I don't know. I turned my whole file over to the**
 12 **public defender, State of Ohio.**
 13 Q. Do you feel that a good military history is a
 14 significant mitigating factor?
 15 **A. Can't hurt.**
 16 Q. Do you recall if it was even brought up in the
 17 mitigation hearing?
 18 **A. Whatever the record shows.**
 19 Q. Would there be any good reason not to bring it
 20 up if it was a good military history?
 21 **A. Not that I can think of. I don't know.**
 22 Q. I believe you had his mother testify in
 23 mitigation hearing. Do you recall that?
 24 **A. Ms. McCeechan, yes, I'm sure I did. Really, I**

1 **don't even recall but I'm sure I did. She was the only**
 2 **light that I had at the end of any tunnel.**
 3 Q. How much time did the court give you between
 4 the guilty verdict and the mitigation hearing, if you
 5 recall?
 6 **A. I don't recall. I'm sure it wasn't**
 7 **immediately.**
 8 Q. Did you talk to very many family members or
 9 friends or employers?
 10 **A. That I don't recall either. I talked to**
 11 **whoever Crates got together for me and told me -- Jim did a**
 12 **lot of -- Jim Crates did a lot of the background for us.**
 13 Q. He pretty much got you the names; is that
 14 right?
 15 **A. Oh, yeah, and whatever names we gave him. We**
 16 **worked together on it. I've worked with Jim Crates many**
 17 **times.**
 18 Q. Do you recall him not getting along very well
 19 with Dr. Schmidt-Goessling in this case?
 20 **A. Who, Crates?**
 21 Q. Yeah, Crates.
 22 **A. I don't remember that.**
 23 Q. In fact, Dr. Schmidt-Goessling from the court
 24 clinic actually testified for the state, did she not?

1 **A. If it's in the record.**
 2 MR. KETCHAM: Can we have a couple-minute
 3 break?
 4 (A recess was taken from 10:44 to 10:49.)
 5 THE WITNESS: I just talked to Mark and he
 6 refreshed my memory. We did try another one together
 7 which we took a plea on.
 8 Q. Was that before or after Clemons?
 9 **A. It was before Clemons.**
 10 Q. I was going to ask you, since you gave your
 11 file to the public defender that's probably some time ago
 12 for the post-conviction, I imagine?
 13 **A. I gave it to them when the appeal went up. I**
 14 **don't recall who handled the appeal.**
 15 Q. I don't either.
 16 **A. I don't, but they asked me for my file and I**
 17 **turned over my file to them.**
 18 Q. Did you keep any of it? Did you have a chance
 19 to review anything before the deposition today? I know it
 20 was short notice.
 21 **A. I looked at a couple of the newspaper articles**
 22 **but that's all I had in there.**
 23 Q. Did you talk to Mark and refresh your memory
 24 about it?

6 (Pages 18 to 21)

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1 A. Yeah, I talked to him and asked him, does he
2 remember. And I don't think he remembers much of it either.
3 You know, he did a few of them, too. Logan Stahl was the
4 other.

5 Q. That was the other -- was that a plea? That
6 was a trial, wasn't it?

7 A. That was a trial and Logan Stahl turned out a
8 plea.

9 Q. I remember the case.

10 A. And Logan Stahl does not have to be up there.

11 Q. That was not with Mark though?

12 A. That was with Mark.

13 Q. Okay.

14 A. I screamed at that man to take the plea but he
15 would not do it.

16 Q. I remember that supreme court case well. Do
17 you remember any of the other eight that you had on death
18 row?

19 A. Yes. A man by the name of Smith that killed
20 some guy up in the University area, some P&G exec. And then
21 I've got -- I'm trying to think of the names -- Rohaus, who
22 was a killer out in Cheviot, knifed a girl. That was a bad
23 one. And then I've got -- let's see. What was the one we
24 just did. They printed it in the paper.

1 Q. Some of them since Clemons?

2 A. I think Clemons may have been my last one.
3 There was was one more. There was some guy out in Madison
4 Place killed his wife. Got an appeal on that one.

5 Q. Have all of them been in Hamilton County?

6 A. Yeah. No. I know I did more after that. And
7 then I've got a kid that knifed a couple out in -- killed
8 them, out in Springfield Township. And I don't remember his
9 name either. There has been a couple since. There were
10 cases since Clemons.

11 Q. Back when Clemons was tried how did common
12 pleas court here handle the alternate juror situation?

13 A. We usually had two at least, maybe three,
14 sometimes three alternate jurors. At least two. I know not
15 just one, always, at least two and sometimes three.

16 Q. Do you remember if they would sit in on the
17 deliberations, would not be allowed to say anything, how
18 they would handle that?

19 A. The best I can recall every time I have had,
20 you know, the alternate jurors they were separated and they
21 were put in a different room than the 12 main jurors. And
22 they did not take part in the deliberation. I think they
23 were given -- I'm not sure if they were given the evidence
24 at all or they were just there in case something happened to

1 someone in the deliberations.

2 Q. Then they were brought back for the penalty
3 phase in case something happened?

4 A. Right. I think they had a chance before that
5 to look at the evidence. You know, I'm not sure exactly but
6 I know they were separated. They did not participate in the
7 deliberations.

8 Q. For the penalty phase, also, they were
9 separated?

10 A. Yes.

11 MR. KETCHAM: Thank you.

12 CROSS-EXAMINATION

13 BY MS. BERRIEN:

14 Q. I have a couple of questions. You said that
15 you sent your file to the PD's office?

16 A. That's right.

17 Q. So your files would be more accurate than your
18 recollection today, wouldn't it?

19 A. Probably the transcript would be the best
20 recollection I would have.

21 Q. Were you ever contacted by Clemons' appellate
22 counsel after you gave the file to the PD's office?

23 A. I have no independent recollection of that.

24 Q. So you didn't sign an affidavit in this case?

1 A. That I didn't do what I was supposed to do?

2 Q. Mm-hmm.

3 A. Not to me, lady. I tried that the best I
4 could. And you have to be in the trenches to understand
5 what the best is. And I didn't feel that I did anything
6 wrong and there was no reason I would ever sign an
7 affidavit.

8 Q. Did you have a chance to review the allegations
9 that Mr. Clemons had set forth?

10 A. No. I would probably know what they say
11 because you have to do something on appeal.

12 Q. You said that since 1965 even though you don't
13 keep score you have had, roughly, about 40 capital cases?

14 A. Somewhere probably in the excess of that. I
15 have tried probably 60 to 75 murder cases altogether but not
16 all first degrees.

17 Q. Do you have to take continuing legal education
18 classes?

19 A. I was until I quit doing them.

20 Q. To be qualified on the cases?

21 A. I kept my qualifications up until I decided I
22 wasn't going to take any more.

23 Q. When you prepare for a trial in the very
24 beginning, do you prepare for both portions, the guilt phase

1 and the mitigation, or do you wait until the guilt phase is
2 over to see if you need to prepare for mitigation?

3 A. They work simultaneously. You have to look
4 forward to the end.

5 Q. And you had your mitigation specialist from the
6 beginning, James Crates?

7 A. Shortly, as soon as we could get the judge to
8 appoint him. But I contacted him before and I'm sure that
9 the entry went on after he was on the job. But once I got
10 the nod from the judge that I could use him, that's all I
11 needed. The entry probably went on later. But as long as I
12 had the judge's okay then I went ahead with him, with Jim.
13 And I had worked with Jim before so, you know, after all he
14 has to be paid.

15 Q. Did he make a written report for you?

16 A. I don't recall. I'm sure. He always did but I
17 just don't have any independent recollection in this case.

18 Q. But if he did, it would be in your file that
19 you gave to the public defender?

20 A. Yes. I would not keep that out.

21 Q. And as you said, James Crates did mostly
22 background checks into Clemons' social history and military,
23 education?

24 A. Jim Crates is what's known as a mitigation

1 specialist. And he did whatever was necessary in the line
2 of mitigation. And he was on the job from the beginning.
3 You certainly can't wait until the jury comes in guilty and
4 then get into it. You have to do it long before.

5 Q. Do it from the beginning?

6 A. That's correct. That's just standard operating
7 procedure.

8 Q. Earlier you had mentioned that Clemons was
9 taking Prozac because he was diagnosed as manic-depressive.

10 A. That's what he told me.

11 Q. Okay. So from what you recall, it was his self
12 diagnosis and Dr. Day began prescribing him Prozac?

13 A. Well, I just know what people told me, that he
14 was on Prozac and that the doctor said that it was
15 prescription, what I recall. I really don't have a real set
16 memory of this because after you try a case you just can't
17 keep it in your mind. You have to make room for whatever
18 you're doing today or tomorrow. And you just can't keep all
19 this, and quite frankly, I don't want to look like I'm
20 shying away from these questions but I just don't remember.
21 It's a way of keeping my sanity instead of trying to keep
22 all this in my head.

23 MS. BERRIEN: One minute, please.
24 (Discussion off the record.)

1 Q. Do you recall filing a not guilty by reason of
2 insanity defense?

3 A. Whatever is in the record, I filed. And I
4 probably did. I don't know. I can't tell you that. I may
5 have filed it and went through it but he didn't meet the
6 test.

7 Q. Do you recall not questioning Clemons'
8 competency to stand trial?

9 A. I don't recall that.

10 Q. But he was talking with you and you used that
11 to prepare for your defense?

12 A. Yes, he was coherent.

13 Q. Do you recall that there were inconsistencies
14 about whether Clemons was taking Prozac or whether he had
15 actually taken a pill the morning of the killings or around
16 had time of the killings?

17 A. I don't recall.

18 Q. You also said that preparing for the trial you
19 spoke to the manufacturer of Prozac?

20 A. Somebody from Lilly.

21 Q. And Dr. Keck as well?

22 A. I'm sure if that was his doctor that's who I
23 talked to.

24 Q. That was the state's witness?

1 A. Yes.

2 Q. You also said that Clemons had indicated to you
3 that he was taking a generic form of Prozac while he was in
4 jail. Do you recall that?

5 A. I don't recall. I'm sure he was on something,
6 probably. I don't know what it was. I don't remember.

7 Q. But if he had told you that, would you have
8 questioned that with the officials at the jail?

9 A. Yes.

10 MS. BERRIEN: I'm sorry. One more minute.
11 (Discussion off the record.)

12 Q. You said you talked to Mr. Clemons. Did you
13 talk to him about his state of mind at the time of the
14 events?

15 A. I always -- any client I want to know what
16 state of mind. And he was a little hacked -- I do remember
17 him telling me this, that he was a little hacked that he
18 thought they were picking on him out there.

19 Q. I'm sorry. When you say they were picking on
20 him who are you referring to? The people at his job?

21 A. Right.

22 Q. So you used Mr. Clemons' answers as part of
23 your defense, you used that when you were factoring in to
24 developing a defense for him; is that fair to say?

8 (Pages 26 to 29)

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1 A. Probably so.
 2 Q. You also indicated that Clemons' mother was the
 3 only light at the end of the tunnel earlier?
 4 A. I'm sorry?
 5 Q. That Clemons mother was the only light at the
 6 end of the tunnel?
 7 A. She was a good witness. That's about all I
 8 could say.
 9 Q. And you had her testify in mitigation?
 10 A. Yes.
 11 Q. But is it fair to say that you spoke to her
 12 before the mitigation phase began?
 13 A. Many times.
 14 MS. BERRIEN: That's all I have. Thank you
 15 very much.
 16 MR. KETCHAM: Nothing. Thank you.
 17 THE WITNESS: I'll waive.

18 (Signature waived.)

19 DALE G. SCHMIDT

20 ---
 21
 22 DEPOSITION CONCLUDED AT 11:00 A.M.
 23
 24

1 CERTIFICATE
 2 COMMONWEALTH OF KENTUCKY :
 3 : SS
 4 COUNTY OF CAMPBELL :
 5 I, Sherry L. Music, the undersigned, a duly
 6 qualified and commissioned notary public within and for the
 7 Commonwealth of Kentucky, do hereby certify that before the
 8 giving of his aforesaid deposition, DALE G. SCHMIDT was by
 9 me first duly sworn to depose the truth, the whole truth and
 10 nothing but the truth; that the foregoing is the deposition
 11 given at said time and place by DALE G. SCHMIDT; that said
 12 deposition was taken in all respects pursuant to
 13 stipulations of counsel; that I am neither a relative of nor
 14 employee of any of the parties or their counsel, and have no
 15 interest whatever in the result of the action; that I am
 16 not, nor is the court reporting firm with which I am
 17 affiliated, under a contract as defined in Civil Rule 28(D).
 18 IN WITNESS WHEREOF, I hereunto set my hand and
 19 official seal of office at Newport, Kentucky, this _____
 20 day of _____, 2003.

21
 22 _____
 23 My commission expires: Sherry L. Music
 24 February 22, 2003. Notary Public - Commonwealth of
 Kentucky

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